

## FINDINGS OF FACT

After reviewing the record compiled to date, the Appeals Board finds:

- (1) Minerva Martinez alleges she either injured or aggravated her back while working for Fowler Nursing Home from January 1997 through February 28, 1997. On the latter date and while working for the nursing home, Ms. Martinez allegedly arose from her chair and struck her back on a nearby chair handle causing her severe back pain.
- (2) Because the Administrative Law Judge awarded Ms. Martinez preliminary hearing benefits, the Judge implicitly found that Ms. Martinez sustained personal injury by accident arising out of and in the course of employment with the nursing home. Based upon the record compiled to date, the Appeals Board affirms that finding.
- (3) Although the Appeals Board questions whether the described incident is responsible for the herniated lumbar disc that Ms. Martinez now has, the evidence establishes that the February 28, 1997 incident, at the very least, aggravated or intensified the disc condition or its symptoms. Ms. Martinez has a long-standing history of back complaints. But she was able to perform her job duties until the February 1997 incident.
- (4) Although a complete presentation of the facts for purposes of final award may establish that the February 28, 1997, incident was only a temporary aggravation or flare-up of a preexisting condition, the Appeals Board agrees with Judge Fuller's preliminary analysis and conclusion.

#### **CONCLUSIONS OF LAW**

The Appeals Board's jurisdiction to review preliminary hearing findings is limited. The following issues are deemed jurisdictional.<sup>1</sup>

- (i) Did the worker sustain an accidental injury?
- (ii) Did the injury arise out of and in the course of employment?
- (iii) Did the worker provide timely notice and claim?
- (iv) Do certain defenses apply that go to the very basis and compensability of the claim?

The Appeals Board may also review those preliminary hearing orders where the Administrative Law Judge has exceeded his or her jurisdiction or authority.<sup>2</sup>

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<sup>1</sup>K.S.A. 1997 Supp. 44-534a.

<sup>2</sup>K.S.A. 1997 Supp. 44-551.

Considering the above, the Appeals Board may review the issue whether Ms. Martinez sustained personal injury by accident arising out of and in the course of employment with Fowler Nursing Home. But the Board does not have the jurisdiction or authority to reweigh the evidence to determine if Ms. Martinez is temporarily and totally disabled or the appropriate amount of her average weekly wage.

(2) An accidental injury is compensable even where the accident only serves to aggravate a preexisting condition.<sup>3</sup> The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.<sup>4</sup>

As indicated above, Ms. Martinez has established that, at the very least, she has aggravated a preexisting back condition while working for the nursing home. Therefore, the accident is compensable under the Workers Compensation Act.

(3) As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.<sup>5</sup>

**WHEREFORE**, the Appeals Board affirms the preliminary hearing order dated August 12, 1998, entered by Administrative Law Judge Pamela J. Fuller.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1998.

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BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS  
Randall D. Grisell, Garden City, KS  
Pamela J. Fuller, Administrative Law Judge  
Philip S. Harness, Director

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<sup>3</sup>Odell v. Unified School District, 206 Kan. 752, 481 P.2d 974 (1971).

<sup>4</sup>Woodward v. Beech Aircraft Corporation, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

<sup>5</sup>K.S.A. 1997 Supp. 44-534a(a)(2).